No. 10,775

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JESSIE F. KING and GEORGE C. KING,
Appellants,

vs.

J. H. YANCEY, doing business under the firm and/or fictitious name of YANCEY INSULATION CO.,
Appellee.

PETITION FOR RE-HEARING

E. F. LUNSFORD and
BERT M. GOLDWATER,
First National Bank Bldg.,
Reno, Nevada,
Attorneys for Petitioner-Appellee.

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TO THE HON. THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT:

NOW COMES the above named Appellee, J. H. Yancey, through his attorneys, E. F. LUNSFORD and BERT M. GOLDWATER, and respectfully petitions the above entitled Court for a re-hearing herein, upon the following grounds and for the following reasons:

I.

The Opinion fails to follow the rule of Master and Servant in Nevada under a recent decision.

The opinion holds that as a matter of law, Mr. King was acting within the scope of his employment if he *supposed* the arrangement with Mrs. King would be of mutual advantage to the employer and himself. This holding does not follow the law of Nevada, decided January 29, 1945, in the case of J. C. Penney, Inc., et al v. Gravelle, 155 Pac. (2d) 477 (Advance Sheets), wherein the Court lays down the rule in Nevada to be that what an employee thought was in the scope of employment is not controlling, but rather, the question is, was it within the scope of his employment as shown by the proof? The Court in that recent case also held, contrary to the opinion herein, that where acts are not within any express authority nor within the scope of duty or employment, the principle of respondeat superior does not apply. Said case was not reported until February 9, 1945, two days after the opinion herein, when it appeared in the edition of that day of the Carson City, Nevada, *Chronicle*.

II.

The Opinion joins two separate and distinct invitations into one.

The Court ignores the fact that there are two separate, distinct and special invitations in the case: One, an invitation to accompany Mr. King on the trip, and, two, an invitation to use the premises. The Court fails to apply the rules of law regarding the scope of employment and

the test of mutual advantage to each invitation, but treats the entire conduct as one invitation. The Court has bound together in the opinion two different invitations, each distinct from the other, into one act.

III.

The Opinion erroneously cites SEAVY v. IXL LAUNDRY CO. as authority.

The Court has rested its opinion on the case of Seavy v. IXL Laundry Co., 60 Nev. 324, which is not applicable, as that case required an *entry* by a *customer for the purpose of transacting business* and the use of the toilet which was *commonly* used by *customers.*

IV.

The Opinion erroneously cites NEVADA TRANSFER & WAREHOUSE CO. v. PETERSON as authority.

The Court has further rested its opinion upon Nevada Transfer & Warehouse Co. v. Peterson, 60 Nev. 87, which case is not applicable, for the reason that the plaintiff in that case *actually discharged on the premises,* at the request of the employee *in charge of the premises,* an act which was specifically within the scope of employment of that employee and of mutual benefit to the employee and the defendant therein. Further, the employee in that case gained his authority from his position as watchman and the *emergency* of the occasion.

The Opinion erroneously cites SMITH v. PICKWICK STAGE SYSTEM as authority.

The Court further rested its opinion on the case of Smith v. Pickwick Stages System, 113 Cal. App. 118, 297 Pac. 140, which case is not applicable, as the plaintiff in that case *entered the premises for the purpose of aiding the employee* to discharge his duty to his employer, which duty was within the scope of his employment, and of mutual benefit to the employee and the employer.

VI.

The Opinion, in effect, erroneously holds that the personal and intimate use of the toilet was of benefit to Defendant and within the scope of employment of Mr. King.

The opinion finds as a matter of law that the personal and intimate use of the premises was included in the general invitation to accompany Mr. King on the trip, and that the use of the premises by Mrs. King was "an item, so to speak, on the agenda of the trip." (Court's opinion, page 5). Such language in the opinion erroneously determines that from a general invitation of an employee to have someone accompany him in his automobile, stems the right to use premises out of which the employee works. The original invitation to accompany which may or may not be of mutual advantage to employer and employee, does not under the facts pleaded include the right to use the premises of the employer. The invitation to accompany and the invitation to use the premises are each pleaded separately in the complaint and bear no

relationship when the scope of employment and mutual advantage tests are applied.

VII.

The Opinion enlarges the scope of employment of an outside salesman so as to make the master liable to acts on the premises by third persons.

The opinion fails to note that as to the premises, there was no invitation express or implied by the employer, J. H. Yancey, and the special invitation by Mr. King to use the premises was an afterthought and unconnected with the invitation to accompany. (Tr. 4-5). The special invitation to use the premises, which invitation was first rejected and later accepted, was made by, what the complaint alleges to be, an outside salesman: "*** that *in the regular course of his employment,* he worked *out of the business house* or place where the business of the Defendant was conducted ***." (Italics supplied) (Tr. 3). The opinion fails to note that the invitation made by Mr. King could not be within the scope of his employment as alleged in the complaint. The scope of employment as shown by the complaint was to call upon prospective customers outside the premises, and the use of the premises by Mr. King to carry out the requirements of his employment was to "there get certain materials and samples which he in turn intended to exhibit to the prospective customer." (Tr. 4). The opinion, in effect, enlarges the scope of employment to include the discharge of duties on the *premises,* which are not alleged in the complaint.

VIII.

The Opinion erroneously fails to decide the case on questions of law.

The opinion states: "Concededly, the dismissal was error if, on proof of the facts pleaded a jury might rationally have found that the woman was an invitee." (Court's opinion page 3). The opinion then decided that the dismissal of the district court was error and the question is one for the jury. In the case at bar, the facts are so amply pleaded with such fine and precise detail and explanation, that there remains nothing for a jury to find as a matter of fact. All facts having been admitted by the motion to dismiss, there remains *no finding of fact for the jury.* The facts being clear and admitted, *the question is one of law as to the status of Mrs. King.* The opinion fails to apply the law to the facts, but leaves the question of law to a jury. The facts clearly showing that there was no express or implied authority for Mr. King to invite his wife either in his automobile or on the premises, such invitation being on the face of the pleading beyond the scope of his authority, and not within any duty of his employment, the rule of respondeat superior does not apply, and there is no case stated against the defendant.

IX.

In conclusion, the decision leaves the entire outcome of the case upon the personal opinion of Mr. King, and not upon the facts as alleged, for if Mr. King supposed his conduct was of mutual advantage to himself and the employer, such supposition under the Court's decision, would

be controlling. And further, the opinion conclusively holds that the request to accompany and the invitation to use the toilet was within the scope of employment and of mutual benefit to the employer and the employee in aiding the latter to discharge his duties within the scope of that employment.

WHEREFORE, Appellee respectfully petitions the Court for a re-hearing herein.

E. F. LUNSFORD and
BERT M. GOLDWATER,
Attorneys for Petitioner-Appellee.

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition, in my opinion, is well founded and entitled to the favorable consideration of the Court and that it is not interposed for delay.

Dated, Reno, Nevada, March 3, 1945.

BERT M. GOLDWATER,
One of the Attorneys for Petitioner-Appellee.